

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 Casper Sleep, Inc.,

4 Plaintiff,

5 v.

16 Cv. 3224 (JSR)

6 Jack Mitcham and Mattress Nerd  
7 LLC,

8 Defendant.

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9 New York, N.Y.  
10 August 9, 2016  
4:00 p.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14 APPEARANCES

15 FRANKFURT KURNIT KLEIN & SELZ, P.C.

Attorneys for Plaintiff

16 CRAIG WHITNEY

17 LIJIA GONG

CAREN DECTER

18 THOMPSON BUKHER, LLP

Attorneys for Defendant

19 TIM BUKHER

1 MR. BUKHER:

2 (Case called)

3 THE DEPUTY CLERK: Will counsel identify yourselves  
4 for the record and be seated.

5 MR. WHITNEY: Good afternoon, your Honor. Craig  
6 Whitney, LiJia Gong and Caren Decter, Frankfurt Kurnit Klein &  
7 Selz for the plaintiff.

8 THE COURT: Good afternoon.

9 MR. WHITNEY: I just want to point out, Ms. Decter has  
10 not yet filed her notice of appearance. It was an oversight  
11 before we got here. I just wanted to make your Honor aware of  
12 that in case there's an issue.

13 THE COURT: That's very disturbing. We're still  
14 delighted to have her here.

15 MR. WHITNEY: Thank you, your Honor.

16 MR. BUKHER: Good afternoon, your Honor. Tim Bukher,  
17 Thompson Bukher for the defendants, Mattress Nerd and Jack  
18 Mitcham.

19 THE COURT: Good afternoon.

20 We're here on the defendants' motion to dismiss, so  
21 let me hear first from defense counsel.

22 MR. BUKHER: Your Honor, Tim Bukher for the  
23 defendants.

24 As you know, this is a case under the Lanham Act of  
25 false advertising, specifically against my clients who are

1 mattress product reviewers, online mattress product reviewers,  
2 brought by Casper Sleep Inc., which is a mattress manufacturer.

3 THE COURT: So one of the things your clients  
4 emphasize, in effect, is their objectivity, right?

5 MR. BUKHER: In fact, one of the allegations here in  
6 the complaint is that they do not adequately disclose their  
7 objectivity.

8 THE COURT: Well, let me just find -- in your client's  
9 website, let me just find --

10 MR. BUKHER: If it helps your Honor, I'll say that the  
11 clients did state --

12 THE COURT: There's a long statement about -- that  
13 your client has -- which I'm searching for right now. Just  
14 bear with me one minute, I'll find it.

15 MR. BUKHER: Of course.

16 THE COURT: So in mattressnerds.com's web page, it's  
17 stated, "It's difficult to find an unbiased source or guidance  
18 when mattress shopping. Many mattress guides out there are  
19 written by the companies trying to sell their mattress," but in  
20 this case, your client has, "switched sides to be on the side  
21 of the consumer," so as to be, "brand agnostic and retailer  
22 agnostic."

23 Then on the sidebar of mattressnerds.com's web pages,  
24 there's an affiliate disclaimer which says, "On my site, I will  
25 often recommend products and links to other websites. In many

1 of those cases I get paid a small commission if you end up  
2 purchasing anything through those links. Unlike a mattress  
3 salesman at a store, I don't just get paid commissions from one  
4 brand or one retailer, I'm an affiliate for many different  
5 companies, so I can help find you great deals no matter what  
6 they are. I have not been paid to write any of these articles,  
7 and all these opinions are completely my own. I also do not  
8 accept paid advertising placement on my site. My only  
9 compensation is when I help match a reader to the right product  
10 and that reader makes the purchase through a link on my site,  
11 and this way I can act as a brand agnostic and retailer  
12 agnostic salesman." Do I have that right?

13 MR. BUKHER: That's absolutely correct, your Honor.

14 THE COURT: So what he is promoting as the benefit of  
15 his reviews is that he's subjective and unbiased, yes?

16 MR. BUKHER: Correct. And your Honor, if we get to  
17 the facts of this matter, my client will prove that he has  
18 equal pecuniary motivation with respect to any of the brands  
19 that he reviews on his website, but I don't think we get to the  
20 facts of this case, your Honor, because it's well-settled law  
21 that the Lanham Act does not create a cause of action against  
22 someone's claims of bias or lack of bias on their website.

23 In this case, there's a lack of proximate cause  
24 between --

25 THE COURT: So I agree that proximate cause is the

1 issue under the Lanham Act -- we'll get to the state cause of  
2 action in a minute -- and I agree with you also that there has  
3 to be, under the Lanham Act, a false or misleading statement  
4 that is the proximate cause.

5 So the assertion, as I understand it, in effect, is  
6 that he's affirmatively asserting a lack of pecuniary bias --  
7 for lack of a better way to put it -- when, in fact, he alters  
8 his reviews depending on whether they're an affiliate or not.

9 MR. BUKHER: That is the plaintiff's allegation, which  
10 we'll accept as true for the purposes of this motion, and then  
11 moving again to whether these assertions could in any way be  
12 seen as a proximate cause of plaintiff's losses.

13 THE COURT: Why not?

14 MR. BUKHER: Several reasons, in fact, your Honor.  
15 The Supreme Court in Lexmark International v. Static Control  
16 Components in fact articulated the standard for proximate cause  
17 under the Lanham Act false advertisement claims stating, "The  
18 plaintiff must show economic or reputational injury flowing  
19 directly from the deception brought by the defendant's  
20 advertising."

21 Now, in this case, the statements that my client makes  
22 are statements going to the quality of his own services, which  
23 are product review services, they're not at all statements made  
24 to the quality or lack of quality of the plaintiff's product.

25 THE COURT: But the assertion, as I understand it, is

1 that the only reason anyone would be paying any attention or  
2 give any weight to this guy's reviews is because of his  
3 assertion that he's economically unbiased. So that if, in  
4 fact, they read a bad review of a Casper mattress, and they  
5 therefore purchase some other brand or don't purchase a Casper  
6 mattress that they otherwise would purchase, the reason for it  
7 is because what they were being told, in effect, was "my  
8 unbiased opinion is X" when, in fact, it was failed to disclose  
9 or failed to fully disclose the economics involved.

10 MR. BUKHER: Your Honor, it's our position, which we  
11 believe is supported by case law, that plaintiffs only have  
12 proximate cause under the Lanham Act if consumers reading our  
13 client's reviews decided to purchase or not purchase a Casper  
14 bed, and those reviews contain some sort of false statement  
15 that caused them, for example, not to purchase a Casper bed.

16 THE COURT: I guess what I'm trying to get at is,  
17 isn't part of the review -- indeed, the only reason anyone even  
18 bothers to read the review, is because of the assertions of  
19 economic objectivity.

20 MR. BUKHER: I think ultimately --

21 THE COURT: So that, in fact, in putting it sort of  
22 proximate proximate terms, the person wouldn't even read the  
23 review or bother to pay any attention or give it any weight if  
24 they knew, for example, that -- and this a much more extreme  
25 case than here -- that this reviewer's bought and purchased by

1 the company it's purporting to objectively review.

2 MR. BUKHER: As you said yourself, your Honor, it's a  
3 proximate proximate cause. We're looking at two steps. In  
4 fact, a recent case, which we urge your Honor to at least view  
5 as instructive coming out of the Eastern District of Virginia,  
6 this year in May, 2016, arising from the standards set out in  
7 Supreme Court Lexmark --

8 THE COURT: That's a very helpful case and certainly  
9 supports your position. The case is Wall & Associates versus  
10 Better Business Bureau, 2016 West Law 3087055, and it came down  
11 just a few weeks ago.

12 MR. BUKHER: That's correct, your Honor. And there,  
13 the facts are practically identical, and you have this  
14 proximate proximate cause situation, as you said, basically two  
15 steps removed. I'll quote the court there. It says, "It  
16 appeared that Wall, aware they could not sue under Lanham over  
17 true statements and opinions," which is essentially what's  
18 being conceded here, they're not attacking the substance of the  
19 reviews, "has attempted to identify statements a few steps  
20 removed in the causal chain, and this fails the proximate cause  
21 test under Lexmark."

22 We're arguing the exact same thing here, your Honor.  
23 Basically, they're trying to make a claim that's wobbly under  
24 Lanham Act and they fail, and so they're trying to essentially  
25 make a claim that really belongs to the Fair Trade Commission

1 under the FTCA, which does not provide a valid cause of action,  
2 your Honor.

3 THE COURT: Let's switch gears for a minute to  
4 Section 349 of New York general business law. So that's a  
5 broader statute, and it prohibits deceptive acts or practices  
6 in the conduct of any business trade or commerce or in the  
7 furnishing of any service.

8 So assuming for the sake of argument that the Lanham  
9 Act claim is deficient in the ways you've argued, why couldn't  
10 they still have a claim under Section 349?

11 MR. BUKHER: Well, your Honor, New York courts have  
12 consistently held that Section 349 is not a false advertising  
13 statute for businesses to resolve civil disputes of this  
14 nature, it's specifically tailored to protect danger to public  
15 health and safety.

16 THE COURT: You say that, but I don't see that in the  
17 New York decisions. This is a New York law, and the decisions  
18 that have given it the very narrow -- or maybe that's the wrong  
19 way to put it. They have talked about the need for subduing  
20 any ramifications for the public at large, or for potential  
21 danger to the public health or safety, or language of that sort  
22 are mostly decisions from my colleagues in the federal court,  
23 mostly district court cases which, of course, I always take a  
24 good look at but which are not ultimately binding on me.

25 What is binding on me are New York Court of Appeals



1 decisions and the Second Circuit interpretations of the  
2 New York Court of Appeals, and those seem to be simply saying  
3 that there has to be consumer-oriented conduct that is  
4 materially misleading, and that an injury that arises from the  
5 allegedly deceptive practice. That's the Second Circuit's take  
6 on it in Orlander v. Staples, 702 F.3d 289.

7 The New York Court of Appeals itself has emphasized  
8 that "Section 349 is a broad remedial statute." That's a quote  
9 from Blue Cross/Blue Shield of New Jersey versus Philip Morris.  
10 3 NY3d 200.

11 The New York Court of Appeals has also mentioned that  
12 Section 249, "applies to virtually all economic activity, and  
13 its application has been correspondingly broad." That's a  
14 quote from Karlin v. IVF, 93 NY 2d 282.

15 Maybe I've missed it, but what is the decision from in  
16 the New York Court of Appeals or some other New York court that  
17 gives it the narrow interpretation that you want me to give it?

18 MR. BUKHER: Your Honor, I would point you to  
19 Securitron Magnalock Corp. v. Schnabolk, if I pronounced that  
20 correctly, which is a Second Circuit decision, 1995, 65 F.3d  
21 256. Essentially, it goes into the fact that 349 has been  
22 viewed by the court under two standards; one is when consumers  
23 make a complaint, because again, the law is tailored to protect  
24 consumers, and one where corporate plaintiffs make a complaint  
25 under the statute. Specifically, the case underscores the fact

1 that the law was not tailored for corporate plaintiffs to  
2 resolve what are essentially trademark or Lanham Act false  
3 advertising grievances. It says that, "Unlike consumer  
4 plaintiffs, corporate plaintiffs only have standing to bring  
5 claims under Section 349 of the New York general business  
6 law" -- and I quote this -- "so long as some harm to the public  
7 at large is at issue." No harm to the public at alarm can be  
8 alleged here, your Honor.

9 THE COURT: That's a case I must admit I haven't yet  
10 read, so you undoubtedly cited it, I just haven't had a chance  
11 to read it. Give me that cite again.

12 MR. BUKHER: It is 65 F.3d 256.

13 THE COURT: Second Circuit?

14 MR. BUKHER: Second Circuit 1995.

15 THE COURT: Okay.

16 MR. BUKHER: It accords with the Southern District  
17 case but --

18 THE COURT: I'm aware of the Southern District cases  
19 that support the position you're taking --

20 MR. BUKHER: The Romeo and Juliette case.

21 THE COURT: -- but they are not binding on me. I  
22 obviously pay attention to them. All right.

23 We'll come back to you in a minute. Let me hear from  
24 your adversary. Thank you.

25 MR. BUKHER: Thank you, your Honor.

1 MR. WHITNEY: Hello, your Honor. So I think -- and I  
2 know we made this point in our briefs, but I can't stress it  
3 enough -- defendants are paid salesmen here. They are getting  
4 compensated by Casper's competitors, and one competitor in  
5 particular is compensating them to the tune of hundreds of  
6 thousands of dollars to tout that competitor's product and  
7 misdirect consumers from buying Casper's products to buying  
8 Casper's competitor's products. They are known in the --

9 THE COURT: So if there were no statements about "I'm  
10 objective", then the fact that there was, in the most extreme  
11 case, a commercial bribe wouldn't matter under the Lanham Act,  
12 would it? There's no requirement -- the Lanham Act is not an  
13 affirmative disclosure act so far as private plaintiffs are  
14 concern. The FTC can go further, but for you to have the  
15 ability to bring this cause of action, you need to show  
16 something that is a misrepresentation, true?

17 MR. WHITNEY: Well, as your Honor said before, without  
18 an affirmative statement of impartiality, objectivity, the  
19 website would have almost no value. I mean, if there's  
20 something in there --

21 THE COURT: So all right. But the statement that you  
22 have to show, I think, is that the statement is misleading. It  
23 doesn't have to be false, but it has to at least be materially  
24 misleading.

25 Now, looking at the affiliate disclaimer that I read

1 before, he says, "On my site I will often recommend products  
2 and links to other websites. In many of those cases," which  
3 one is faced implies but not all, "I get paid a small  
4 commission if you end up purchasing anything through those  
5 links. Unlike a mattress salesman in a store, I don't just get  
6 paid commission from one brand or one retailer, I'm an  
7 affiliate for many different companies so I can help you find  
8 great deals no matter where they are. I have not been paid to  
9 write any of these articles and all these opinions are  
10 completely my own. I also do not accept paid advertising  
11 placement on my site. My only compensation is when I help  
12 match a reader to the right product and that reader makes a  
13 purchase through a link on my site. This way I can act as a  
14 brand agnostic and retailer agnostic salesman."

15 So he's saying, number one, that I don't get any other  
16 kind of compensation. Nothing in your complaint suggests  
17 anything to the contrary. Second, that the compensation he  
18 gets through this affiliate arrangement when there is a sale  
19 applies to many, but he certainly doesn't say all, products  
20 that he reviews. So what's misleading about that?

21 MR. WHITNEY: Your Honor, you can't take that one  
22 statement in isolation and not look at the other statements  
23 he's also making to determine whether or not it's misleading.  
24 Which, in fairness, we're going to have to prove that consumers  
25 are misled. You obviously are not going to take my word for

1 it, but we contend that that is misleading, that when he's  
2 saying "I'm brand agnostic. I'm unbiased. I used to be a  
3 salesman and now I switched to be on your team, and I'm just  
4 here for you," that's a ruse, your Honor. He is being paid a  
5 substantial amount of money to tout one brand in particular,  
6 and he is making consumers think that he's not. It's false  
7 advertising, your Honor. And, yes, we have to prove that these  
8 things are true, and we'll have to prove that consumers are  
9 confused, but he certainly makes these statements, and we  
10 certainly contend that they are false and misleading.

11 THE COURT: Well, I'm still not clear in what respect  
12 you say what I just read was false and misleading. Now, there  
13 may be other statements we want to take a look at. Assuming,  
14 just to move ahead, assuming for the sake of argument that  
15 there are false or misleading statements regarding his economic  
16 affiliations. The reason that's a factor that a consumer would  
17 take into account perhaps, but the immediate reason they're not  
18 buying your product is because it got a lousy review compared  
19 to someone else, right?

20 MR. WHITNEY: Well, yes. He's telling you you should  
21 buy Casper's competitor instead of Casper.

22 THE COURT: Even assuming your view, why isn't that a  
23 secondary cause, a nonproximate cause? The immediate cause is  
24 the lousy review. I'm trying to think what would be a  
25 good analogy. I bought the gun to kill you because I wanted

1 your -- because under your will I inherited money. That would  
2 be the motive, but no one would claim that's the proximate  
3 cause. The proximate cause of your death would be my firing  
4 the bullet.

5 By the way, the record should reflect I do not have  
6 any present intention of taking any of these steps.

7 But why isn't that sort of a fair analogy? The reason  
8 you're not buying the mattress is because of the lousy review.  
9 Your motive for crediting the lousy review was your belief,  
10 your misguided under your view belief, that it was objective  
11 when it was actually being materially affected by the  
12 reviewer's economic interests that he didn't adequately  
13 disclose, under your views. But why isn't that one step  
14 removed from proximate cause?

15 MR. WHITNEY: I think you're parsing out the proximate  
16 cause perhaps a little too finely, your Honor, under the law.

17 First, I'd like to point out a case for your Honor  
18 that I think is very enlightening that was not cited in our  
19 brief because it came out very recently, a few weeks ago in  
20 this district.

21 THE COURT: Have you supplied a copy to your  
22 adversary?

23 MR. WHITNEY: I have not.

24 THE COURT: I will allow you to mention it, but I will  
25 give him a chance, after we're through today, if he wants to

1 put in a brief letter about it because he hasn't seen it yet.

2 MR. WHITNEY: Sure, your Honor.

3 The case is Enigma Software Group v. Bleeping  
4 Computer. It's 2016 WL 3773394, Judge Engelmayer, where the  
5 defendant was an affiliate advertiser and the plaintiff was a  
6 product manufacturer. It was a company that developed computer  
7 software security products.

8 The defendant was an affiliate of a competitor of the  
9 plaintiff's. They went online, said, "You need to buy this  
10 competitor's product," they received commissions from sales in  
11 the competitor's product, and Judge Engelmayer, under a Lexmark  
12 analysis, determined that there was standing by the product  
13 manufacturer, the product brand, to bring a Lanham Act false  
14 advertising claim.

15 THE COURT: By the way, the standing is really -- I  
16 know the older case law calls it that, but it's not a standing  
17 issue, it's a proximate causation issue. I think we can all  
18 agree on that.

19 MR. WHITNEY: Yes, your Honor. Although there's two  
20 separate issues with the proximate causation that I think make  
21 it a little intertwined, as well. Because part of it is  
22 materiality, is whether what the statement is that the  
23 defendants -- the misstatement affected consumer purchasing  
24 decisions.

25 That is, first of all, a very fact-based analysis that

1 many courts have said is not really subjected to a motion to  
2 dismiss in most instances, which I believe would also be the  
3 case here, because we would have to prove that that statement  
4 was material. But the misleading statement by the defendants  
5 that, "I'm objective and I have no skin in the game," caused  
6 consumers to behave in a particular manner.

7         The Better Business Bureau case that was cited is very  
8 different than this case for a very specific reason in that  
9 Better Business Bureau is not a salesman, they don't sell  
10 products. Here, the defendants are actively selling  
11 competitors' products of Casper. They are saying, "Don't buy  
12 it there." Taking a side-by-side analysis saying, "Don't buy a  
13 Casper, buy a Leesa. Click here right now to buy it, and then  
14 I get paid a lot of money to do that." That is false  
15 advertising your Honor. They are acting on behalf of these  
16 companies, they are making statements, they're making  
17 side-by-side comparisons, which I would say in addition to the  
18 misleading statement about their objectivity is actually  
19 misleading about the Casper product. I don't take defendant's  
20 position that they don't say anything about the product to be  
21 the end of the story. They are saying that the Casper mattress  
22 is not as good as these other mattresses. They're making  
23 several objective -- I'm sorry -- several -- yeah --  
24 comparative -- substantiable comparative analyses with Casper's  
25 competitors saying, "A lot of people like the Leesa better."



1 Well, what is the evidence of that? What is the substantiation  
2 behind that? Leesa certainly couldn't make that claim, and  
3 defendants can't make that claim. That's a statement of fact,  
4 and that's untrue, unless they have substantiation for it.

5 They're saying that the foam layers on Casper's aren't  
6 as good for most people as the foam layers on the Leesa  
7 mattress. I'm using this as the example. That is a statement  
8 that is verifiable, and again, we would say that is untrue and  
9 it's part of misstatements we are alleging in the complaint.

10 There are actually false statements about the Casper  
11 product, I would submit, your Honor, but in addition, the  
12 entire purpose for defendant's existence is to sell these  
13 competing products, and they are duping the consumers into  
14 believing they're not. It's native advertising. It's somewhat  
15 novel in the era of social media and the new millennium, so to  
16 speak, or whatever. I'm dating myself, but -- and that is why  
17 the FTC actually --

18 THE COURT: I can't remember back to the new  
19 millennium.

20 MR. WHITNEY: Your Honor, my point is that there  
21 probably aren't a ton of on-point cases directly focusing on  
22 this advertising because it is relatively new, which is one of  
23 the reasons why the FTC has come down so strongly and tried to  
24 put some guidelines as to what the behavior is. That doesn't  
25 mean that the Lanham Act doesn't apply here. That doesn't mean

1 that the statements are not misleading and are not duping the  
2 public. They are causing competitors -- this is what we've  
3 alleged -- are causing competitors of Casper to buy mattresses  
4 base on false statements, or at least misleading statements.

5 THE COURT: Let me switch gears on you also to the  
6 state cause of action.

7 Now, your adversary brought my attention to a case  
8 that I hadn't looked at when he cited it, but thanks to my law  
9 clerk I now have looked at it. *Securitron v. Schnabolk*, 65  
10 F.3d 256, Second Circuit, 1995 in which the Court of Appeals  
11 says, "The critical question then is whether the matter affects  
12 the public interest in New York, not whether the suit is  
13 brought by a consumer or a competitor."

14 So assuming, arguendo, that that is binding on me and  
15 still good law, what's the harm to the public interest here?

16 MR. WHITNEY: Well, it's consumer confusion, your  
17 Honor. Everything we're alleging is causing harm to the public  
18 in addition to causing harm to Casper's bottom line. They are  
19 being misled. This is a -- what the -- and I don't believe  
20 that this decision changes what many subsequent decisions have  
21 held, both at the Court of Appeals, New York State Appellate  
22 Division, and other Second Circuit decisions. This case was  
23 really about whether a business competitor -- whether business  
24 competitors had standing under 349, which it ultimately  
25 concluded that they did. But nothing, we believe, in that

1 statement changes the general tenor of the statute, which is  
2 it's a consumer protection statute, and here, consumers are  
3 being harmed, and they are being, again, misled.

4 There are cases we've cited that -- obviously, the  
5 fact patterns have slight differences, but they're analogous in  
6 the sense that when a consumer is misled to buy a competitor's  
7 product, then the plaintiff who is harmed by it has standing  
8 and has cause of action under 349.

9 THE COURT: So do you allege anywhere in your  
10 complaint, for example, that if consumers had known, or you say  
11 they should have been told, they would have purchased Casper's  
12 mattresses?

13 MR. WHITNEY: I believe we do, your Honor, yes.

14 THE COURT: Point me to where that is.

15 MR. WHITNEY: So in the Casper damages section, which  
16 is starting on page 15, but it's paragraphs 55 through, really,  
17 59 or 60. What we're alleging, in part -- and we'll  
18 obviously -- some of this is on information and belief because,  
19 frankly, your Honor, we need a lot of information from the  
20 defendants in order to substantiate that consumers were  
21 going -- how consumers arrived at their site and where they  
22 left.

23 THE COURT: Yes. So I think the closest to the  
24 statement of the kind that I was looking for is paragraph 58.

25 MR. WHITNEY: I think that's right, yes.

1 THE COURT: "Upon information and belief, potential  
2 Casper mattress purchasers, including potential purchases  
3 located in New York, have been diverted to Mitcham's also  
4 misleading Mattress Nerd reviews through Casper-related  
5 internet searches. As a result of being deceived into  
6 believing in Mitcham's independence and nonbiases, these  
7 consumers have purchased mattresses from Casper's competitors  
8 rather than Casper." So what's your basis for that statement?

9 MR. WHITNEY: Well, part of it is you go back to the  
10 paragraph before, for example, in 57, and the defendant  
11 actually makes a few public statements to this regard, but  
12 nevertheless, if you look for a Casper mattress online, for  
13 example, you're searching for a Casper, meaning you are an  
14 interested consumer in a Casper product, you are one -- of the  
15 options you get is Mattress Nerd saying, "Hey, look at me. I'm  
16 this objective reviewer. Don't go to Casper yet, come to me."

17 THE COURT: I know all that, but I'm saying, what's  
18 your basis for alleging in the complaint that that actually  
19 affected any consumers?

20 MR. WHITNEY: Well, your Honor, part of it is  
21 information and belief, and the basis is that just by --

22 THE COURT: So what's the information -- belief, I  
23 understand. What's your information that is the basis?

24 MR. WHITNEY: It's website traffic. It's the way that  
25 the internet --

1 THE COURT: For example, have you done any analysis  
2 of -- Casper used to be an affiliate, as I understand it,  
3 correct?

4 MR. WHITNEY: Briefly, yes, your Honor.

5 THE COURT: And what was the difference in -- what was  
6 the level of Casper sales?

7 MR. WHITNEY: I don't know offhand. But just -- I  
8 understand where you're going with this, your Honor. Part of  
9 the difficulty in that analysis in isolation is the level of  
10 sales differ on so many factors that you really can't do a  
11 one-to-one comparison that would really be all that valuable  
12 right there because --

13 THE COURT: That, I would agree. That sounds  
14 reasonable, yes.

15 MR. WHITNEY: So you have to look at, all right,  
16 there's a certain amount of website traffic that would have  
17 gone to Casper, instead went to Mattress Nerd and never came  
18 back to Casper. We have to presume it went to -- some of it we  
19 need in discovery. We don't know the web traffic, and that's  
20 part of what we're looking for.

21 THE COURT: For example, are you going to have an  
22 actual consumer step forward and say, "I was just about to  
23 purchase a Casper mattress until I read that review, and I was  
24 shocked to see how poor a review it was, and so I purchased  
25 some other mattress?"

1 MR. WHITNEY: We have an economist that's going to  
2 look at the web trafficking behavior and look at the different  
3 sales and Mr. Mitcham's revenue and how it changed over time.  
4 We're going to look at -- we're going to have consumer surveys  
5 about whether they were confused by this behavior and whether  
6 it impacted their purchasing decisions. There will obviously  
7 have to be evidence to that fact. I think for pleading  
8 purposes, there's only so far we can go in light of what we  
9 would need in discovery.

10 THE COURT: I agree. A survey is perhaps a way to get  
11 at this, but how are you going to -- it has to be a survey of  
12 people who were actually on the website, yes? How will you  
13 know?

14 MR. WHITNEY: It would be a survey of potential  
15 customers because it impacts future and past --

16 THE COURT: Potential customers who were  
17 nevertheless -- how are you going to show they are potential  
18 customers who would have gone to that website?

19 MR. WHITNEY: I think that's pretty common in Lanham  
20 Act surveying, your Honor. You look at who would be a  
21 potential sphere of customers. If someone said, "My product is  
22 better than yours," you're not going to be able to find every  
23 single person that felt that they made a purchasing decision  
24 based on that behavior -- that was a bad example, but if they  
25 make an actual statement, a misrepresentation, you need to look

1 at okay, here's the universe of customers that are potential --  
2 a basis for the customers, and how many -- you know, what  
3 percentage of them would be redirected. And in terms of the  
4 actual numbers, that's at a level that is going to go to  
5 someone who is far greater attuned to e-Commerce than I am as a  
6 lawyer. We will need someone who is an economist that will  
7 look into the consumer purchasing behavior and people who are  
8 marketing experts and they will put together an expert report.

9 THE COURT: All right. Thank you very much. Let me  
10 go back to your adversary.

11 MR. BUKHER: Your Honor, I just wanted to make a  
12 couple of statements. One of which -- and only the reason I  
13 make it is I was very surprised to see my adversary raise this  
14 point because it goes quite opposite to the position that he  
15 took in his opposition to this motion.

16 Specifically, we devoted a good chunk of our moving  
17 paper to how opinions are not actionable under the Lanham Act.  
18 And then the opposition paper said "Well, no, we're not saying  
19 that your reviews, which are opinions, are actionable, we're  
20 not saying they're false or misleading, we're saying that your  
21 affiliate disclosures are false and misleading."

22 Now my adversary is saying that the reviews have  
23 statements to the effect that most people would not find this  
24 mattress comfortable and so on.

25 First of all, that's not alleged. To the extent that

1 he's made certain reviews, he would say that, "I found this not  
2 comfortable. I think this is not comfortable." These are  
3 opinions, in any case. But secondly, they are opinions and  
4 they are not actionable.

5 The other point that I wanted to make is that we can't  
6 assume for the sake of argument, as your Honor said, that  
7 certain statements made in the affiliate disclosures are simply  
8 misleading. Because the plaintiff cannot -- under  
9 Iqbal/Twombly make a compulsory allegation saying that the  
10 defendant made misleading statements and this harmed us. They  
11 have to actually point us to which statements we have to  
12 defend. He's seeking to use these FTCA guidelines to basically  
13 say that our affiliate disclosures -- which were made. There's  
14 no question that the affiliate disclosures were made that they  
15 disclosed the fact that our client received commissions from  
16 other mattress manufacturers, and at some point from Casper,  
17 who has only been around from 2014, and I believe only  
18 started -- or rather stopped being an affiliate in 2015, which  
19 was a year ago -- discloses that he received commissions.

20 They're seeking to say that their disclosures are  
21 inadequate under these FTCA guidelines, and because they're  
22 inadequate under the FTCA guidelines -- only because they're  
23 inadequate under the FTCA guidelines -- they are suddenly  
24 misleading and deceptive under the Lanham Act. That does not  
25 work, your Honor.



1 And ultimately -- this goes back to the proximate  
2 cause question -- we talked about, you know, this issue of  
3 whether consumers think that the website has more value because  
4 it represents itself as unbiased. Okay. If the consumers  
5 think that the website has more value than other product review  
6 websites, then I think that other product review websites might  
7 have a Lanham Act claim against our client because they are  
8 competitors, and potentially, if those affiliate disclosures  
9 are misleading, then that could be actionable under the Lanham  
10 Act by the competitors.

11 But again, we reach a proximate cause issue when the  
12 manufacturer seems to claim that, whether the website has value  
13 has some sort of affect on their bottom line, their sales.

14 THE COURT: All right. Let me ask you a different  
15 question. Thank you for that.

16 Securitron, the case you brought to my attention a few  
17 minutes ago, which I've now had a chance to look at, well, it  
18 does have the language you quoted, and of course, in Securitron  
19 they did find that there was harm to the public, even though  
20 the action was brought by a competitor not by a consumer. But  
21 what also strikes me about Securitron, more importantly, is  
22 that it's really rendered before the New York Court of Appeals  
23 cases that I referred to earlier, so in that sense, it's not  
24 necessarily binding on me, I ultimately have to follow what the  
25 New York highest court says about it in the statute. So I

1 wondered if you wanted to say anything more about that

2 MR. BUKHER: Your Honor, while I'm not as familiar  
3 with the New York Court of Appeals cases, I would really just  
4 point to whether those Court of Appeals cases talked about  
5 corporate plaintiffs. And again, I apologize for my ignorance  
6 on that point, but I think to the extent that Securitron is  
7 instructive to the extent that it talks about corporate  
8 plaintiffs and seems to follow this --

9 THE COURT: Well, what it says, Securitron says -- and  
10 here's the relevant language, "Appellants contend that  
11 Securitron has no standing to assert a claim under New York  
12 general business law Section 349 because Securitron has not  
13 demonstrated any harm to the public and is simply a business  
14 competitor of the Appellants. We reject this contention.  
15 Although the statute is at its core a consumer protection  
16 device, corporate competitors now have standing to bring a  
17 claim under the statute so long as some harm to the public at  
18 large is an issue. The critical question then is whether the  
19 matter affects the public interest in New York, not whether the  
20 suit is brought by a consumer or a competitor."

21 Then they go on to say, "Here there is harm to the  
22 public," although the facts are very different from this case,  
23 and so it leaves open the question of whether harm to the  
24 public is adequately alleged in this case before us here. In  
25 Securitron, the allegation was that the defendant, Schnabolk,

1 caused a regulatory agency to undertake various investigations  
2 that proved to interfere with the sale of the product and to  
3 lead to false suggestions and so forth. That was a very  
4 different case from this case because the public interest was  
5 directly involved through the allegedly false complaint to the  
6 Consumer Protection Agency, which then undertook harmful  
7 investigations.

8 But nevertheless, the language I just quoted doesn't  
9 make the slightest distinction between a consumer plaintiff and  
10 a competitor plaintiff as long as the matter affects the public  
11 interest.

12 MR. BUKHER: I think ultimately, your Honor, the  
13 question for the Court is to decide whether a website that  
14 touts itself as unbiased -- and again, we'll assume for the  
15 sake of argument that it is biased -- whether that affects the  
16 New York public interest. I think there are other Southern  
17 District courts anyway that opine on questions similar to that,  
18 and one in 2015, which I believe is -- again, it's -- may only  
19 be instructive to your Honor, but if we look at Conopco Inc. v.  
20 Wells Enterprises, 2015 WL 2330115, Southern District,  
21 May 14th, 2015 --

22 THE COURT: Is that case cited in your brief?

23 MR. BUKHER: It is on page 10, your Honor, of the  
24 reply.

25 THE COURT: Very good.

1 MR. BUKHER: -- said, "Courts addressing the question  
2 of harm under 349 have drawn a distinction between false  
3 advertising claims that pose a danger to the consumer and those  
4 that merely encourage consumers to buy an inferior product or  
5 buy a product from one company where there may have been a  
6 preference to buy from another."

7 THE COURT: Okay. I'm running short on time because  
8 of other matters I have. Let me just say, is there anything  
9 else that you wanted to say? I'll give your adversary one last  
10 shot, also.

11 MR. BUKHER: That is really it, your Honor. It's just  
12 going back to the question of proximate cause.

13 THE COURT: Let me hear from plaintiff's counsel.

14 MR. WHITNEY: Just a few things, your Honor. I'll try  
15 to be brief.

16 One, on the proximate cause question for Lexmark. The  
17 Lexmark case specifically talks about that the injury proximate  
18 cause needs to flow from the defendant's wrongdoing, and that a  
19 showing is not made, for example, when deception produces  
20 injury to a fellow commercial actor that would, in turn, affect  
21 the plaintiff.

22 So the proximate cause question is whether the harm is  
23 two steps removed from the person who is injured. So the  
24 examples given by the Court was, if the harm is to a tenant,  
25 the landlord can't sue as they were harmed, or the electric

1 company can't sue that they're harmed because they're not  
2 getting their bill, and these are specific examples included in  
3 Lexmark.

4 We submit that we don't believe the Supreme Court was  
5 meaning to parse so closely the statement and the injuries so  
6 that you don't -- as a standing question that you cannot make a  
7 Lanham Act claim. We are clearly -- you know, my client is  
8 clearly the entity that was targeted here and that is impacted  
9 by the alleged false and misleading statements, and we've made  
10 several statements in our amended complaint about how the  
11 injury flowed from the conduct and how we are the party harmed.

12 Defendants like to position themselves as just, again,  
13 some mattress review website that only would compete with other  
14 mattress review websites. They are selling competing products  
15 directly from their site. They are linking directly to  
16 competitors' products and causing us very significant and very  
17 direct harm, so we would submit that this should squarely fall  
18 within the Lexmark test.

19 THE COURT: Let me just, to interrupt for a second. I  
20 now have taken a look at the case you mentioned, Enigma  
21 Software -- and I will give your adversary a chance to put in a  
22 one-page letter about that if he wishes to. But to be frank,  
23 I'm not going to require him to do that because it doesn't seem  
24 to me to add much materiality to this debate. So this is a  
25 23-page single-spaced decision -- 23 pages in the printed thing

1 so it must have been many more pages in the original -- filed  
2 by my very energetic colleague Paul Engelmayer. He only gets  
3 to the issue you're talking about at the very, very end,  
4 literally a couple of paragraphs before the end of the opinion,  
5 and then all he says is, on the question of proximate cause, he  
6 outlines what the second amended complaint alleges, and then  
7 says that the defendant, "itself acknowledges its ability to  
8 influence customers." So it doesn't sound that -- Judge  
9 Engelmayer apparently didn't sound -- like much of a dispute.

10 Again, if your adversary wants to put in a letter not  
11 to exceed one page about this case, he's welcome to do so, but  
12 I'm not going to require him to do so. If he does do so, he  
13 should do so by the end of this week. But it seems to me that  
14 there was not much of a dispute in that case over what is  
15 highly disputed in this case.

16 MR. WHITNEY: Well, your Honor, I believe that the  
17 defendant also touts itself as being one that could influence  
18 consumer decisions. In those disclaimers that you were  
19 referring to earlier he says -- bear with me one moment, your  
20 Honor -- that he promises to help thousands of potential  
21 mattress purchasers through his website. I mean, he --

22 THE COURT: Well, I'll read you the entire -- this is  
23 the entirety of Judge Engelmayer's decision on this issue. As  
24 I say, it comes in the very last part of his opinion.

25 "Fourth, the second amended complaint alleges that "as

1 a direct and proximate result of defendant's unlawful acts,  
2 plaintiff has suffered significant monetary and reputational  
3 injury, including direct diversion of sales and a lessening of  
4 good will associated with the products. According to the  
5 secondhand amended complaint, defendant's members, many of whom  
6 do not know the basic concepts that underlie computer issues,  
7 rely on defendant's representations and recommendations when  
8 purchasing the relevant products. Indeed, the second amended  
9 complaint alleges that defendant itself acknowledges its  
10 ability to influence customers." There's a quote from the  
11 defendant's materials, and then the Judge Engelmayer continues,  
12 "And the cognizable materials show that at least one consumer  
13 has heeded defendant's advice to plaintiff's detriment," which  
14 we certainly don't have in this case. "These allegations  
15 adequately plead that plaintiff's business has been injured as  
16 a result of defendant's misrepresentations."

17 It is a barebones discussion, at best, because it  
18 clearly is the least important issue of what was before Judge  
19 Engelmayer, as shown by where he places it in his opinion.  
20 It's dealt with in a single paragraph and includes both, in  
21 effect, an acknowledgment by the defendant and an actual  
22 example of some consumer who has relied, to his detriment, on  
23 the material misrepresentations.

24 So it's certainly not harmful to you, but I don't see  
25 why it's particularly material.

1 MR. WHITNEY: I don't want to rely too heavily on this  
2 case, your Honor. I'm not citing it as this is it, we've found  
3 the gold standard. I would just note that prior to the section  
4 that you had read, it is towards the end, it's the last issue  
5 he deals with, but there's the question -- the section starts  
6 with, "Has ESG stated a Lanham Act claim for false  
7 advertising," then goes back a few pages, and there's  
8 discussion that flows from there, including a discussion, not a  
9 lengthy one, but a discussion of how Lexmark applies to this  
10 circumstance. And that's really what I was referring to.

11 THE COURT: Okay. That's on page 22, and I haven't  
12 looked at that.

13 MR. WHITNEY: Again, your Honor, there are factual  
14 differences. I do believe the defendant in this case probably  
15 went further than the defendants in our case. In fact, there  
16 was a claim for defamation that we are not making here. So  
17 certainly, there are statements that are being made.

18 The point was that it created -- it was a situation  
19 where a plaintiff was suing a quote/unquote affiliate marketer,  
20 and there is an objection as to whether there was standing  
21 under Lexmark to do so, and the Lanham Act, and the Court said  
22 that there was. That was the purpose of citing that case, your  
23 Honor.

24 THE COURT: All right. So I thank both sides for your  
25 very helpful argument. I will, so we can move this case along



1 one way or the other, get you a bottom line decision by the end  
2 of this month. I won't give you a full opinion, that will  
3 follow in due course, but you will at least know where we  
4 stand, which is either the whole thing is gone, the whole thing  
5 remains, or in between.

6 Thanks very much.

7 (Adjourned)